Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 52.

ARCH R. EVERSON,
Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.,
Appellees.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE.

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Introductory Statement.

The Commonwealth of Massachusetts is one of several States which have enacted legislation similar to that the constitutionality of which is questioned in this appeal.

The constitutionality of the Massachusetts legislation is involved in this appeal and the Commonwealth of Massachusetts is directly interested in the case. The Massachusetts legislation was passed only after full consideration was given by its Legislature to the constitutionality of the measure as well as to its need.

Prior decisions of this Court as well as decisions of its own Supreme Judicial Court were relied on by the Massachusetts Legislature in reaching the conclusion that the legislation enacted would be constitutional if enacted.

A decision that legislation such as that in issue cannot be enacted by State Legislatures will not only be a departure from established principles but will prevent the States from making their own provision for transportation of school children according to the conditions existing in each particular State, and in the case of Massachusetts will upset a system of transportation which has been in operation for nearly ten years. In support of the constitutionality of the legislation the Commonwealth of Massachusetts respectfully submits the following arguments which have particular reference to the situation of Massachusetts, and Massachusetts further supports fully the position of the appellees as set forth in their brief, which covers every aspect of the case completely and with a wealth of citation, both case and statutory.

I.

The Massachusetts legislation is contained in Massachusetts General Laws, c. 40, sec. 5, par. (2), which, as amended by chapter 390 of the Acts of 1936 (the amendment being shown in italics), reads as follows:

> "SECTION 5. A town may at any town meeting appropriate money for the following purposes:
>
> . . . . . .
>
> "(2) For the support of public schools authorized or required by law, and for conveying pupils to and from the public schools, or, if it maintains no high school or public school of corresponding grade, but affords high school instruction by sending pupils to other towns, for the necessary transportation expenses of such pupils, the same to be expended by the school committee in its discretion. *Pupils attending private schools of elementary and high school grade, except*

such schools as are operated for profit, in whole or in part, shall be entitled to the same rights and privileges as to transportation to and from school as are provided herein for pupils of public schools."

The power granted by the provision quoted is extended to cities by section 1 of chapter 40 of the General Laws of Massachusetts, which reads in part as follows: "Except as otherwise expressly provided, cities shall have all the powers of towns . . ."

When this legislation was proposed in Massachusetts in 1936 the Legislature, through the Chairman of the Joint Committee on Education, requested an opinion of the Attorney General as to whether the measure, if enacted into law, would be constitutional. In an opinion dated February 17, 1936, which is published in the Report of the Attorney General of Massachusetts for the year ending November 30, 1936, at pages 40-43, and which is set out in full in the Appendix of this brief, the Attorney General, referring to *Commonwealth* v. *Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 439, affirmed in *Interstate Consolidated St. Ry. Co.* v. *Massachusetts*, 207 U. S. 79, and to *Cochran* v. *Board of Education*, 281 U. S. 370, stated (*infra*, p. 18): ". . . legislation authorizing cities and towns to appropriate and expend money for transportation furnished directly to the children, and not to the schools, would violate no constitutional provision, either State or Federal."

In an opinion rendered under date of December 23, 1936, to the Commission of Education answering certain questions as to the interpretation of the law after it had been enacted, the Attorney General confirmed his earlier opinion as to the constitutionality of the provision. The opinion of December 23, 1936, is published in the Report of the Attorney General of Massachusetts for the year ending November 30, 1937, at pages 37-38.

II.

It seems clear that the legislation under attack is justified, not only as an aid to education, but also as a protection of the health of the children from exposure to the elements as well as from the hazards of traffic. The expenditure of public funds under the authority of such legislation is an expenditure for a public purpose and is not a deprivation of property without due process of law.

If such legislation were to be voided on the ground that the expenditure of funds thereunder was not for a public purpose, much other beneficial legislation, such as that contained in Massachusetts General Laws, c. 40, sec. 5, par. (40), as inserted by St. 1937, c. 185, would come under a cloud. The Massachusetts law referred to authorizes cities and towns to appropriate money "To provide eyeglasses and spectacles for school children eighteen years of age or under who are in need thereof and whose parents or guardians are financially unable to furnish the same."

The Massachusetts school transportation statute, like the New Jersey statute, benefits the child and not the school, and the benefit to the child is entirely subordinate to and incidental to the public purpose of fostering education and the health and safety of the child. Under the principles laid down by this Court and by the Massachusetts Supreme Judicial Court, such legislation is not open to constitutional objection as not being for a public purpose.

In an *Opinion of the Justices to the House of Representatives*, under date of June 8, 1946, reported in Massachusetts Advance Sheets, 1946, pp. 799-808, the constitutionality of a measure to authorize cities and towns to raise and expend public funds and to contract with the Federal Public Housing Authority to procure sites, erect and rent temporary housing for veterans, made available under Public Law 849, 76th Congress, was sustained. The Opinion states that the expenditure of funds provided for by the

proposed statute would be for a public purpose even though individuals as such would profit thereby.

III.

In connection with the claim of the appellant that the New Jersey legislation constitutes an establishment of religion or an interference with the free exercise of religion, the history of the Massachusetts constitutional provisions with regard to religion and the decisions of our Supreme Judicial Court are of interest. This is particularly so because the appellant, through his failure to read the decision of the Supreme Judicial Court of Massachusetts in the case of *Jenkins* v. *Andover,* 103 Mass. 94, in the light of the history of our Constitution, has cited that case as supporting his claims. That case, however, was decided on the basis of a specific provision added to the Constitution of Massachusetts in 1855 (Article XVIII of the Amendments), which has no counterpart in the Constitution of the United States, and the case is not in point. In fact, the Justices of the Supreme Judicial Court of Massachusetts in an opinion which will be referred to hereafter considering the same question that the appellant claims is raised in this appeal, *i.e.,* the validity of appropriations of public funds for schools under sectarian control in view of the constitutional provisions prohibiting laws establishing a religion or restraining the free exercise of religion, reached a conclusion just exactly the opposite of that contended for by the appellant.

Articles II and III of the Declaration of Rights contained in Part the First of the Constitution of the Commonwealth of Massachusetts, as originally adopted, read as follows:

> "II. It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the

SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

"III. [As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of GOD, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

"And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

"Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive

right of electing their public teachers, and of contracting with them for their support and maintenance.

"And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

"And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.]"

By Article XI of the Amendments to the Constitution of Massachusetts, adopted in 1821, the following article was substituted for the third article of the Bill of Rights:

"Art. XI. Instead of the third article of the bill of rights, the following modification and amendment thereof is substituted.

"'As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;—therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: and all persons belonging to any religious society shall be taken and held to be members,

until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society:—and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.' "

By Article XVIII of the Amendments to the Constitution of Massachusetts, which was adopted in 1855 and which has since been superseded by Article XLVI of the Amendments, adopted in 1917, it was provided as follows:

"ART. XVIII. [All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.]"

In the case of *Commonwealth* v. *Kneeland*, 20 Pick. 206, a case upholding the constitutionality of a statute punishing blasphemy, Judge Morton, in an opinion in which he agreed with his colleagues' views as to the constitutionality of the statute but differed from their interpretation, referring to Article III of the Declaration of Rights, states (at page 233), after a reference to Article II:

"It is true that the next article, as it originally stood, did not seem to be perfectly consistent with this.

It appeared to recognize, not only the Christian religion, but one form of it, protestant Christianity, as the established religion, which was to be maintained as well as protected by the power of the government; to the support of which *all* were to be holden to contribute, and upon the ministrations of which *all* were to be compelled to attend. Whether these two articles were reconcilable or not, we have no occasion to inquire. For if the third article ever restrained, or in any way affected, the construction of the second, it has since been abrogated, and the words of the second are now left to have their full and unqualified operation and effect."

See also the charge of Judge Thacher to the jury in the same case in the trial court, reported in Thacher's Criminal Cases (Boston, 1845), at page 346, and the history of the Constitution of Massachusetts contained in "A Manual for the Constitutional Convention 1917" (Boston, 1917), at page 38.

In 1913 the Massachusetts Senate and House of Representatives passed an order that the Opinion of the Justices of the Supreme Judicial Court be required on the following questions of law:

"First. Do the existing provisions of the Constitution of Massachusetts, and especially Article II of Part the First of the Constitution and Article XI of the amendments thereto, adequately prohibit the passing of any law by the General Court establishing any particular religion or restraining the free exercise of any particular religion?

"Second. Do the existing provisions of the Constitution of Massachusetts, and especially Article XVIII of the amendments thereto, adequately prohibit

the appropriation by the Commonwealth or by any county or municipality of money raised by taxation for maintaining or aiding any church, religious denomination or religious society, or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control?"

A third question as to the necessity for the adoption of a proposed amendment to the Constitution was also asked.

In their Opinion, which is published in 214 Massachusetts at page 599, the Justices state (p. 601):

"The Constitution of the Commonwealth in several clauses inculcates the practice of religion and urges the public worship of God, as essential means for the perpetuation of republican institutions. But in emphatic and unmistakable terms, it guarantees to all our people absolute freedom as to religious belief and liberty unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated. This is clear from art. 2 of the Declaration of Rights and art. 11 of the Amendments, which absolutely prohibit the enactment of any law establishing any particular religion or restraining the free exercise of any particular religion. We answer 'Yes' to the first question.

"So far as the second question relates to the appropriation of money for schools the answer is simple. Article 18 of the Amendments to the Constitution was adopted because of a deep seated conviction of the imperative necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate. Public schools never have

been understood to include higher institutions of learning like colleges and universities. All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words generally have been understood, must be disbursed exclusively for the support of such schools and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect. But there is no constitutional prohibition of appropriations for higher educational institutions, societies or undertakings *under sectarian or ecclesiastical control. Merrick* v. *Amherst*, 12 Allen, 500. *Jenkins* v. *Andover*, 103 Mass. 94.

"So far as the second question relates to the appropriation of public money for aiding any church, religious denomination or religious society, it presents more difficulty. The Chief Justice and Justices Morton, Braley and De Courcy are of opinion that such an appropriation is prohibited by the Constitution and its Amendments, while Justices Hammond, Loring and Sheldon incline to the opposite conclusion." (Italics supplied.)

It is apparent from the language of the Opinion that the Justices were in full agreement that appropriations of public funds for educational purposes, even if the funds are made available for educational institutions under "sectarian or ecclesiastical support," are not appropriations of public money for aiding any church, religious denomination or religious society, and that appropriations of public funds for educational purposes connected with schools under sectarian control are not violations of constitutional provisions prohibiting the establishment of a religion or laws restraining the free exercise of religion. It is only when specific provisions forbidding such appropriations

are added to the Constitution that any question of their validity arises.

IV.

The appellant's claim that an appropriation of public funds for transportation to private as well as public schools, as applied to schools under sectarian control, is the establishment of a religion or a violation of the constitutional right of all to the free exercise of religion, if sustained, would directly affect the validity of the Massachusetts statutes granting exemptions from taxation to religious societies and schools under sectarian control.

In *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, at page 203, the Court says:

> "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government."

In an *Opinion of the Justices of the Supreme Judicial Court of Massachusetts to the Senate* under date of April 3, 1908, reported in 195 Mass. 607, it is stated at page 608:

> "There are other provisions under which the Legislature has acted, relative to particular subjects which involve taxation or exemption from taxation. The third article of the Declaration of Rights, and article XI. of the Amendments which was substituted for it, recognize the importance of the public worship of God, and of instruction in piety, religion and morality, as promoting the happiness and prosperity of a people and the security of a republican government. Accordingly, taxation for these purposes is authorized.

As taxation to procure property for such uses is permitted, exemption of property so procured is legitimate, under the special provisions of the Constitution touching this subject. We have also constitutional requirements for the encouragement of literature and science, the diffusion of education among the people, and the promotion of 'general benevolence, public and private charity' and other kindred virtues. Const. Mass. c. 5, § 2. As taxation of the people may be imposed for these objects, property used for literary, educational, benevolent, charitable or scientific purposes may well be exempted from taxation. Such exemptions do not prevent the taxation of the people from being proportional and equal."

In the case of *Assessors of Boston* v. *Lamson*, 316 Mass. 166, it was held that the personal property valued at $1,000,000 held by the Trustees of the Christian Science Publishing Society and used in the publication of the Christian Science Monitor and in publishing various religious periodicals and publications dealing with Christian Science was "used or appropriated for religious . . . purposes" within G.L. (Ter. Ed.) c. 59, § 5, Tenth, and was exempt from taxation. No question as to the constitutionality of the statute granting the exemption was raised or considered. Yet it would seem that on the appellant's theory the claim could be made that the statute would be unconstitutional as the establishment of a religion or as interfering with the free exercise of religion.

V.

It is submitted that there is no reason for a decision holding the legislation of New Jersey to be in violation of the Constitution of the United States and that, on the contrary,

the New Jersey statute, and that of Massachusetts and the similar statutes of other States, are valid and constitutional exercises of State authority, and the decision of the Court of Errors and Appeals of New Jersey should be sustained.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,

As *Amicus Curiae*,

By its Attorneys,

CLARENCE A. BARNES,

Attorney General.

JAMES J. KELLEHER,

Of Counsel.

Appendix.

OPINION OF THE ATTORNEY GENERAL OF MASSACHUSETTS ADVISING THE LEGISLATURE THAT A STATUTE PROVIDING FOR THE EXPENDITURE OF PUBLIC FUNDS FOR THE TRANSPORTATION OF PUPILS TO PRIVATE SCHOOLS WOULD BE CONSTITUTIONAL.

FEB. 17, 1936.

Hon. CHARLES G. MILES, *Chairman, Joint Committee on Education.*

DEAR SIR:—You have laid before me House Bill No. 1180, entitled "An Act providing that pupils in parochial schools shall be entitled to transportation to and from said schools in the same manner as pupils in public schools," and Senate Bill No. 282, entitled "An Act providing for the transportation of parochial and private school pupils to and from school."

You seek my opinion as to whether these measures, if enacted into law, would be constitutional.

There is no constitutional limitation upon education in this Commonwealth. Mass. Const. Amend. XLVI does not limit education in any degree. It prescribes no mode or method of education and makes no requirement as to institutions in which education must be received. The education of children is a public purpose. It has long been fostered and encouraged in Massachusetts. The purpose to educate the children of the Commonwealth has become deeply embedded in our traditions. It is at the very bed rock of our institutions. The full measure of the police power of our legislative branch of government may be freely invoked to further the cause and the interests of education. For many years in Massachusetts the education of children has been compulsory. It was said by Mr. Justice Holmes, in *Interstate Consolidated St. Ry. Co.* v. *Massa-*

chusetts, 207 U.S. 79, 83, that education is one of the purposes for which what is called the police power may be exercised, and that Massachusetts has always recognized education as "one of the first objects of public care."

While there is no constitutional limitation upon education itself in this Commonwealth, there is in the Constitution a prohibition as to legislation providing for the support and maintenance of private educational institutions out of public moneys. This prohibition is found in Mass. Const. Amend. XLVI, and concerns not only private schools of common school grade but also all higher institutions of learning conducted under private auspices.

It would seem to be manifestly clear that there are matters incidental or kindred to the education of children with reference to which the Legislature may exercise the law-making power without violation of any constitutional mandate. The providing of transportation for children to and from public and private schools out of public moneys appropriated by cities and towns is one of them. Legislation to that end within the scope hereinafter set forth would be constitutional.

The principal test to be applied to such legislation is this: If the legislation contemplates making provision directly or indirectly for the support and maintenance, in whole or in part, of private schools out of public moneys it is unconstitutional. If the purpose of the legislation, however, is to provide a benefit directly to the children attending private schools of common school grade, like the furnishing of transportation to and from school out of public moneys, the legislation is constitutional.

The terms "parochial schools" and "private schools" as they appear in the text of the proposed legislation which you have submitted to me I interpret to mean schools which have an attendance of pupils in the same class as those in attendance at public schools established in accordance with

G. L. (Ter. Ed.) c. 71, §§ 1 and 4. These terms, "parochial schools" and "private schools," as contemplated by the proposed legislation, would not include schools of theology, law, medicine, dentistry, music, art, architecture, agriculture and many others devoted to technical or specialized training. With reference to the proposed legislation, "students in these schools are not in the same class with pupils in public schools. . . . The public schools . . . are intended to provide general instruction for all children and youth." *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309, 312.

Mass. Const. Amend. XLVI, which was substituted for Mass. Const. Amend. XVIII, permits no broader powers to be granted under legislative sanction to cities and towns with reference to educational purposes than might have been granted under the earlier article. V Op. Atty. Gen. 204. Under the earlier article it was held by a former Attorney General that it would be unconstitutional for a town to vote and grant money to pay the tuition of children attending an academy in the town or to pay the tuition of children attending an academy outside of the town. I Op. Atty. Gen. 319. Prior to the adoption of Mass. Const. Amend. XLVI it was held by our Supreme Judicial Court that, under legislative sanction, money might be appropriated by cities and towns for conveying pupils to and from the public schools. Calling attention to the fact that compulsory attendance of children in the schools is provided for by our laws (R. L. c. 44, § 1; now G. L. [Ter. Ed.] c. 76, §§ 1 and 2), the court said that it was within the province of the Legislature to "concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles." *Commonwealth* v. *Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 439, affirmed in *Interstate Consolidated St. Ry. Co.* v. *Massachusetts*,

207 U. S. 79. Where a statute provided for half fares for children attending private as well as public schools, in traveling to and from school, the constitutionality of the statute was sustained. *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309. In that case it was held that the statute included within its scope pupils in private schools, within the meaning of R. L. c. 42, §§ 1 and 2 (now G. L. [Ter. Ed.] c. 76, §§ 1 and 2), but did not include pupils in certain other private schools which were operated by owners for profit. See also *Selectmen of Clinton* v. *Worcester Consolidated St. Ry. Co.*, 199 Mass. 279, 290; V Op. Atty. Gen. 507, 509; *Commonwealth* v. *Boston & Northern St. Ry. Co.*, 212 Mass. 82.

The intended benefit sought by the proposed legislation, upon which you seek my opinion, is a benefit intended for children attending parochial and other private schools, as distinguished from a benefit intended for the schools themselves. In no sense under the terms of the legislation would the schools receive any aid or support or acquire any property rights out of the expenditure of public moneys, the use of public property, or the use of public credit. *Cochran* v. *Board of Education*, 281 U. S. 370. The end sought by the legislation has no relation whatever to the founding, maintaining or supporting of private schools.

The intended purpose of the proposed legislation is a public purpose clearly within the province of the police power of the Legislature. Legislation, however, authorizing the payment of money directly to private schools for transportation of children, thereby in effect lightening the burden of operating expenses of such schools, would be unconstitutional. It would violate Mass. Const. Amend. XLVI. But legislation authorizing cities and town to appropriate and expend money for transportation furnished directly to the children, and not to the schools, would violate no constitutional provision, either State or Federal.

The plain intent of the constitutional provision (Mass. Const. Amend. XLVI) is to prohibit the appropriation or use of public moneys, property or credit for the founding, maintaining or support, in whole or in part, of private as distinguished from public schools. That was the main object, with reference to educational institutions, sought to be accomplished by its adoption. Parochial schools, as well as other private schools, manifestly come within the sweep of this amendment. The use of public moneys, property or credit for the founding, maintenance or support of private schools, in whole or in part, would be clearly unconstitutional.

There appears to be nothing repugnant to the provisions of Mass. Const. Amend. XLVI in legislation authorizing the appropriation of public moneys by cities and towns for the purpose of transporting children to and from school. Legislation authorizing the appropriation of public moneys by cities and towns for this purpose for public schools has withstood the test of many years before and since the adoption of the constitutional amendment under consideration, because such legislation is constitutional. It would be absurd and futile to question it on constitutional grounds. Under the proposed legislation money would not be paid to the schools for transportation, thereby in any case lightening their burdens of operating expenses, but the transportation would be furnished directly to the children by the cities and towns making appropriations therefor. Nothing would go into the treasuries of private schools, for such a course would be illegal and unconstitutional.

The conservation of the health and the protection of the safety of children attending school are important factors to be taken into consideration. They are matters of public concern and vitally affect the interests of the public. The proposed legislation does not merely benefit the children; it benefits the public as well. It authorizes the appropria-

tion and expenditure of public moneys by cities and towns for a public purpose. *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348, 352.

I am therefore of opinion that there is no constitutional objection to either House Bill No. 1180 or to Senate Bill No. 282.

Very truly yours,

PAUL A. DEVER, *Attorney General.*